IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION This Document Relates to: *Shubert v. Bush*, Case No. 07-693	MDL Dkt. No. 06-1791-VRW **PUBLIC DECLARATION OF J. MICHAEL McCONNELL, DIRECTOR OF NATIONAL INTELLIGENCE** Hon. Vaughn R. Walker

PUBLIC DECLARATION OF J. MICHAEL McCONNELL, DIRECTOR OF NATIONAL INTELLIGENCE

I, J. Michael McConnell, do hereby state and declare as follows:

INTRODUCTION

1. I am the Director of National Intelligence (DNI) of the United States. I have held this position since February 2007. Previously, I have served as the Executive Assistant to the Director of Naval Intelligence, as the Chief of Naval Forces Division at the National Security Agency, as Director of Intelligence for the Joint Chiefs of Staff during Operation Desert Storm, and as the Director of the National Security Agency.

2. In the course of my official duties, I have been advised of this lawsuit and the allegations at issue in the Plaintiffs' Amended Complaint. The statements made herein are based on my personal knowledge as well as on information provided to me in my official capacity as Director of National Intelligence. In personally considering this matter, I have executed a separate classified declaration dated May 25, 2007, and lodged *in camera* and *ex parte* in this case. Moreover, I have read and personally considered the information contained in the Public and *In Camera, Ex Parte* Declarations of Lt. Gen. Keith B. Alexander, Director of the National Security Agency, submitted in this case.

3. The purpose of this declaration is to formally assert, in my capacity as the Director of National Intelligence and head of the United States Intelligence Community, the military and state secrets privilege (hereafter "state secrets privilege") and a statutory privilege under the National Security Act, *see* 50 U.S.C. § 403-1(i)(1), in order to protect intelligence information, sources, and methods that are at risk of disclosure in this case. Disclosure of the information covered by this privilege assertion reasonably could be expected to cause exceptionally grave damage to the national security of the United States and, therefore, the information should be excluded from any use in this case. In addition, I concur with Gen. Alexander's conclusion that, because the very subject matter of this lawsuit concerns highly classified and critically important foreign intelligence activities, the risk is great that further litigation will lead to the disclosure of information harmful to U.S. national security and, accordingly, that this case should be dismissed. *See* Public and *In Camera* Alexander Declarations.

BACKGROUND ON DIRECTOR OF NATIONAL INTELLIGENCE

4. The position of Director of National Intelligence was created by Congress in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, §§ 1011(a) and 1097, 118 Stat. 3638, 3643-63, 3698-99 (2004) (amending sections 102 through 104 of Title I of the National Security Act of 1947). Subject to the authority, direction, and control of the President, the Director of National Intelligence serves as the head of the U.S. Intelligence Community and as the principal adviser to the President, the National Security Council, and the Homeland Security Council for intelligence matters related to the national security. *See* 50 U.S.C. § 403(b)(1), (2).

5. The United States "Intelligence Community" includes the Office of the Director of National Intelligence; the Central Intelligence Agency; the National Security Agency; the

Defense Intelligence Agency; the National Geospatial-Intelligence Agency; the National Reconnaissance Office; other offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs; the intelligence elements of the military services, the Federal Bureau of Investigation, the Department of the Treasury, the Department of Energy, the Drug Enforcement Administration, and the Coast Guard; the Bureau of Intelligence and Research of the Department of State; the elements of the Department of Homeland Security concerned with the analysis of intelligence information; and such other elements of any other department or agency as may be designated by the President, or jointly designated by the DNI and heads of the department or agency concerned, as an element of the Intelligence Community. *See* 50 U.S.C. § 401a(4).

6. The responsibilities and authorities of the Director of National Intelligence are set forth in the National Security Act. *See* 50 U.S.C. § 403-1. These responsibilities include ensuring that national intelligence is provided to the President, the heads of the departments and agencies of the Executive Branch, the Chairman of the Joint Chiefs of Staff and senior military commanders, and the Senate and House of Representatives and committees thereof. 50 U.S.C. § 403-1(a)(1). The DNI is also charged with establishing the objectives of, determining the requirements and priorities for, and managing and directing the tasking, collection, analysis, production, and dissemination of national intelligence by elements of the Intelligence Community. *Id.* § 403-1(f)(1)(A)(i) and (ii). The DNI is also responsible for developing and determining, based on proposals submitted by the heads of agencies and departments within the Intelligence Community, an annual consolidated budget for the National Intelligence Program for presentation to the President, and for ensuring the effective execution of the annual budget for intelligence and intelligence-related activities, and for managing and allotting appropriations for the National Intelligence Program. *Id.* § 403-1(c)(1)-(5).

7. In addition, the National Security Act of 1947, as amended, provides that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1(i)(1). Consistent with this responsibility, the DNI establishes and implements guidelines for the Intelligence Community for the classification of information under applicable law, Executive orders, or other Presidential directives and access to and dissemination of intelligence. *Id.* § 403-1(i)(2)(A), (B). In particular, the DNI is responsible for the establishment of uniform standards and procedures for the grant of access to Sensitive Compartmented Information ("SCI") to any officer or employee of any agency or department of the United States, and for ensuring the consistent implementation of those standards throughout such departments and agencies. *Id.* § 403-1(j)(1), (2).

8. By virtue of my position as the Director of National Intelligence, and unless otherwise directed by the President, I have access to all intelligence related to the national security that is collected by any department, agency, or other entity of the United States. Pursuant to Executive Order No. 12958, 3 C.F.R. § 333 (1995), as amended by Executive Order 13292 (March 25, 2003), reprinted as amended in 50 U.S.C.A. § 435 at 93 (Supp. 2004), the President has authorized me to exercise original TOP SECRET classification authority.

ASSERTION OF STATE SECRETS PRIVILEGE

9. After careful and actual personal consideration of the matter, based upon my own knowledge and information obtained in the course of my official duties, including the information contained in the Public and *In Camera* Declarations of Gen. Alexander, I have determined that the disclosure of certain information—as set forth herein and described in more detail in my classified declaration and in the classified declaration of General Alexander—would cause exceptionally grave damage to the national security of the United States and, therefore, must be protected from disclosure and excluded from this case. Thus, as to this information, I

formally assert the state secrets privilege. In addition, it is my judgment that sensitive state secrets are so central to the subject matter of the litigation that any attempt to proceed in the case will substantially risk the disclosure of the privileged information described herein and in more detail in the classified declarations, and will therefore risk exceptionally grave damage to the national security of the United States.

ASSERTION OF STATUTORY PRIVILEGE UNDER NATIONAL SECURITY ACT

10. Through this declaration, I also hereby invoke and assert a statutory privilege held by the Director of National Intelligence under the National Security Act to protect the information described herein, *see* 50 U.S.C. § 403-1(i)(l). My assertion of this statutory privilege for intelligence sources and methods is coextensive with my state secrets privilege assertion.

INFORMATION SUBJECT TO CLAIM OF PRIVILEGE

11. The information subject to the state secrets and statutory privileges I am asserting includes the following:

A. Information that may tend to confirm or deny whether the Plaintiffs have been subject to any alleged NSA intelligence activity that may be at issue in this matter; and

B. Information concerning NSA intelligence activities, sources, or methods, including:

(1) Information concerning the scope and operation of the Terrorist Surveillance Program, including information that may be needed to demonstrate that the TSP was limited to one-end foreign al Qaeda-related communications and that the NSA does not otherwise engage in the content surveillance dragnet that the Plaintiffs allege; and

(2) Any other information concerning NSA intelligence activities, sources, or methods that would be necessary to adjudicate the Plaintiffs' claims, including, to the extent applicable, information that would tend to confirm or deny whether the NSA collects large quantities of communication records information; and

C. Information that may tend to confirm or deny whether Verizon/MCI, AT&T, or any other telecommunications carrier has assisted the NSA with the alleged intelligence activities.

12. First, although Plaintiffs' allegations of NSA surveillance are broad, they appear to be premised on the notion that the President authorized certain intelligence activities after the terrorist attacks of September 11, 2001. To the extent that Plaintiffs are challenging the Terrorist Surveillance Program ("TSP")—an intelligence program aimed at al Qaeda, the existence of which was acknowledged by the President in 2005—and to the extent specific information about the al Qaeda threat underlying the President's authorization for the TSP is needed to adjudicate its lawfulness, such information could not be disclosed without revealing substantive intelligence knowledge of the United States and thereby causing exceptionally grave damage to the national security. Therefore, I assert the state secrets and statutory privilege to protect such information from disclosure.

13. Second, I am also asserting privilege over any information tending to confirm or deny whether particular individuals, including the named Plaintiffs in this lawsuit, have been subject to alleged NSA intelligence activities. Disclosure of such information would cause exceptionally grave harm to the national security. As should be obvious, confirming or denying whether a specific person is a target of surveillance would disclose either who is being targeted—thus compromising that collection—or who is not being targeted, thus revealing to adversaries that an individual is a secure source for communicating or, more broadly, the methods being used to conduct surveillance. Moreover, providing assurances that someone is not being targeted becomes unworkable, and itself revealing, when cases arise where an individual may be targeted, because refusing to confirm or deny only in cases where surveillance is occurring would effectively disclose and compromise that surveillance. The only recourse for

NSA is to neither confirm nor deny whether someone has been targeted or subject to NSA activities, regardless of whether the individual has been targeted or not. To say otherwise when challenged in litigation would result in the frequent, routine exposure of NSA information, sources, and methods, and would severely undermine surveillance activities in general.

14. Third, I am asserting privilege over any other facts concerning NSA intelligence sources and methods that would be needed to adjudicate this case. This encompasses (1) facts concerning the operation of the TSP and any other NSA intelligence activities needed to demonstrate that the TSP was limited as the President stated to the interception of one-end foreign communications reasonably believed to involve a member or agent of al Qaeda or an affiliated terrorist organization, and that the NSA does not otherwise conduct a dragnet of content surveillance as the Plaintiffs allege; (2) other classified facts about the operation of the TSP that would be necessary to adjudicate the lawfulness of that program, to the extent it is at issue in this case; and (3) to the extent applicable, facts that would confirm or deny whether the NSA collects large quantities of communication records information.

15. In December 2005, the President stated that the TSP did not involve the collection of purely domestic communications, or international communications with no al Qaeda connection. I concur with General Alexander that if the NSA had to demonstrate in this case that the TSP was limited as the President stated, and not a dragnet as the Plaintiffs claim, and that the NSA does not otherwise engage in the dragnet that Plaintiffs allege, sensitive and classified facts about the operation of the TSP and NSA intelligence activities would have to be disclosed. I also concur with Gen. Alexander that confirmation or denial of any information concerning allegations, to the extent applicable in this case, that the NSA collects communication records would also disclose information about whether or not the NSA utilizes particular intelligence sources and methods and, thus, the NSA's capabilities or lack thereof. In my judgment, such

disclosures would risk exceptionally grave harm to national security by, for example, enabling foreign adversaries either to evade particular channels of communications that are being monitored, or to exploit channels of communications that are not subject to NSA activities.

16. Fourth, by alleging that they are subscribers of AT&T and Verizon, Plaintiffs appear to put at issue whether or not those companies have provided classified assistance to the NSA with respect to alleged intelligence activities. The disclosure of any information that would tend to confirm or deny allegations of such assistance—to the extent those allegations are at issue in this case—would cause exceptionally grave harm to the national security. Confirming or denying such allegations, again, would reveal to foreign adversaries whether or not the NSA utilizes particular intelligence sources and methods and, thus, either compromise actual sources and methods or disclose that the NSA does not utilize a particular source or method. Such confirmation or denial would also replace speculation with certainty for hostile foreign adversaries who are balancing the risk that a particular channel of communication may not be secure against the need to communicate efficiently.

17. I am unable to describe further on the public record the information covered by my privilege assertion and the national security harms associated with the disclosure of such information. Accordingly, I respectfully refer the Court to my classified declaration, along with Gen. Alexander's classified declaration, both of which were submitted in this case for the Court's *in camera, ex parte* review.

I declare under penalty of perjury that the foregoing is true and correct.

DATE: 24 MAY 07

J. Michael McConnell

J. MICHAEL McCONNELL
Director of National Intelligence